

Issue: Group II Written Notice with 10-day suspension (failure to follow established written policy); Hearing Date: 05/04/04; Decision Issued: 05/13/04; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 688



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 688**

Hearing Date: May 4, 2004  
Decision Issued: May 13, 2004

**PROCEDURAL HISTORY**

On February 9, 2004, Grievant was issued a Group II Written Notice of disciplinary action with ten workday suspension for "Violation of Department of Human Resource Management Policy No. 1.75; Dept. internet audit performed during the week of July 21, 2003, revealed 1hr & 27 min. of alleged non-work related use."

On March 9, 2004, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On April 13, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 4, 2004, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action with ten workday suspension for failure to follow established written policy.

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

## **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Transportation employs Grievant as an Engineering Tech III at one of its facilities. No evidence of prior disciplinary action against Grievant as presented at the hearing.

Agency employees can access the internet using personal computers connected to the Agency's computer network. The Agency maintains a firewall securing the network. A firewall is software designed to protect the network from unauthorized access by persons outside of the network and to monitor usage of those within the computer network. When an employee uses an Agency computer to access the internet, the firewall software records the name of the person logged onto the personal computer and the website accessed by that computer. This is accomplished by assigning an internet protocol (IP) address to the personal computer and monitoring the uniform resource locator (URL) accessed by that computer.

Before accessing the internet, Agency employees see a computer screen saying among other things, "Authorized users are subject to having all activities monitored and recorded without notice, and without user knowledge or permission. \*\*\* Non-job related use is prohibited if it interferes with the user's productivity or work performance ...."<sup>1</sup>

In December 2003, Agency auditors decided to audit employee internet access. They selected for review only employees with 10,000 or more log records in one day from a single IP address. They chose the week of July 21, 2003 and determined all employees meeting the 10,000 record criterion. Grievant was identified as one of the employees for further review.

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<sup>1</sup> Agency Exhibit 5.

On July 22, 2003 from 8:27 a.m. to 4:59 p.m., Grievant used his computer to access the internet for a total of 1 hour and 17 minutes<sup>2</sup> of non-work related information.<sup>3</sup> The Agency did not consider in its calculation of non-work related use, time otherwise devoted to lunch, work breaks, or outside of normal working hours. Grievant accessed web sites dealing with travel, vacation, sports, personal search, and home entertainment systems.<sup>4</sup>

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” DHRM § 1.60(V)(B).<sup>5</sup> Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

DHRM Policy 1.75 permits State employees to use the internet for personal use within certain parameters as follows:

Personal use means use that is not job-related. In general, **incidental and occasional** personal use of the Commonwealth’s Internet access or electronic communication systems is permitted; however, personal use is prohibited if it:

- interferes with the user’s productivity or work performance, or with any other employee’s productivity or work performance;
- adversely affects the efficient operation of the computer system;
- violates any provision of this policy, any supplemental policy adopted by the agency supplying the Internet or electronic communication systems, or any other policy, regulation, law

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<sup>2</sup> The time calculated was originally 1 hour and 27 minutes but reduced to 1 hour and 17 minutes after further review by the Agency.

<sup>3</sup> Agency auditors accounted for things such as pop-up ads and web sites that refreshed content automatically without any action by the computer user.

<sup>4</sup> Agency Exhibit 7.

<sup>5</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

or guideline as set forth by local, State or Federal law. (See Code of Virginia §2.1-804-805; §2.2-2827 as of October 1, 2001.) (Emphasis added).

“Failure to follow ... comply with established written policy” is a Group II offense.<sup>6</sup> By using the internet for 1 hour and 17 minutes during a workday, Grievant acted contrary to DHRM Policy 1.75. His personal use of the internet exceeded the incidental and occasional standard set by policy. Thus, the Group II Written Notice for personal use of the internet must be upheld.

Grievant argues that a ten workday suspension exceeds what is appropriate given the nature of his offense. A suspension of up to ten workdays, however, is permitted when an employee receives a Group II Written Notice.<sup>7</sup>

Grievant contends that the Agency selected the highest day of usage during the week and that day did not represent his work habits. He contends he had limited activity on three of the five days reviewed and, thus, there was no trend of abuse. He adds that he was not informed by Agency managers that he was approaching the limit. Grievant’s argument fails because DHRM Policy 1.75 does not require a trend of abuse. It merely requires one occasion of excessive use of the internet. No policy requires the Agency to notify Grievant that his usage is approaching a level of excess.

Grievant contends that mitigating circumstances exist to reduce the disciplinary action against him. He points to his satisfactory job performance and the fact that no evidence was presented that his internet use adversely affected his work performance.

*Va. Code § 2.2-1001* requires the EDR Director to “[a]dopt rules ... for grievance hearings.” The *Rules for Conducting Grievance Hearings* set forth the Hearing Officer’s authority to mitigate disciplinary action. The Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.” In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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<sup>6</sup> DHRM § 1.60(V)(B)(2)(a).

<sup>7</sup> Grievant argues that the maximum ten workday suspension should be reserved for more serious violations of DHRM Policy 1.75. Grievant’s argument fails because DHRM Policy 1.60 grants the Agency the discretion to determine this level of disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with ten workday suspension is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction

in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>8</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.